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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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RUBY JUMAMIL,

Appellant,

vs.

NOEL COON and DOUGLAS WEST,

Respondents.

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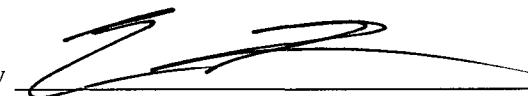
REPLY BRIEF OF APPELLANT

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Respectfully submitted,

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## **I. Summary of Arguments in Reply**

### **A. The willful conduct of the casino is imputed to Coon because he adopted that conduct as his own by continuing to withhold Jumamil's wages.**

The willful conduct of the casino and its agents is imputed to Coon because Coon *himself* adopted that conduct as his own. Implicit in Coon's argument—that he was an absentee owner with no knowledge of the six hours of weekly unpaid labor his dealers were providing—is that things would have somehow been different had Coon only been aware. But we know this is not the case because after learning of the gambling requirement, Coon took the same stance as the casino: “so sue me.”

Coon's “absentee owner” argument would only have merit had he, upon learning what was happening under the guise of his authority, swooped in to remedy the situation—to tender the wages due. The casino was not bankrupt at the time. It was continuing to operate. It was continuing to pay wages. And Coon continued to wield absolute authority over its management.

In his capacity as “employer” or “vice principal,” or “agent,” or whatever else one might wish to label him (*not* in his capacity as defendant), Coon made the willful and knowing decision to *continue* to withhold Jumamil's wages. Coon may not, on the one hand, adopt and

endorse the casino's position that Jumamil was not due wages, yet argue to this Court that the very same conduct should not be imputed to him.

That Coon and his capable legal team knew how to tender unpaid wages without the necessity of litigation is evidenced by his and Jack Newton's response to a subsequent lawsuit. As the supplemental documents added to the record by Respondents show, Jumamil filed a second action. Newton tendered wages less than three weeks later. Coon acted even more quickly (this time), tendering wages within a week.

But Coon took hard-nosed stance in the instant case, leaving Jumamil no other avenue for recovery except a full-fledged lawsuit. While Jumamil contends that an agent's willful withholding of wages should *always* be imputed to a controlling owner, such should certainly be the case where an employer *adopts* the conduct as his own. Regardless of what Coon knew while the policy was in place, he admits he knew about it after the fact. CP 94. Yet he made the willful, knowing, and intentional choice to *continue* to withhold Jumamil's wages, leaving her no other choice but to assert that claim in her lawsuit. He is personally liable as a result.

**B. Coon does not dispute that he benefited from rebated wages. West does not dispute that his gambling policy amounted to the collection of wages for the casino.**

Coon and West continue to disregard the fact that the wage rebating provision of the anti-kickback statute prohibits two distinct acts: (a)

unlawfully “collecting” wages; and (b) “receiving” wages collected unlawfully. RCW 49.52.050(1).

Coon ignores the reality that wages ceded in his favor, are wages he “received” within the meaning of the anti-kickback statute. Though Jumamil has very clearly articulated West’s “collection” of wages as the basis for his liability, West only argues that he never “received” them.

Blurring the distinction between claims is not the same as rebutting them. When the distractions are isolated and disregarded, little substance remains to support the dismissal of Jumamil’s wage rebating claim against both Respondents.

## **II. Record on Review**

Respondents wish to use a procedural rule so that they may misstate existing facts. Indeed, the very first line of West’s brief declares that “Jumamil . . . was terminated . . . for excessive dealer mistakes and poor hand speed.” No, she was not. Jumamil was terminated in violation of public policy. While Respondents may have *believed* their assertions when originally made during summary judgment proceedings, they cannot *now* pretend that an existing fact, confirmed by 12 citizens, and unchallenged on appeal, simply never happened.

While the reasoning underlying RAP 9.12 is generally sound, its rigid application makes less sense here, where a trial on the relevant issues in fact occurred. This is particularly true where Respondents have themselves petitioned the Court to make the jury's verdict part of the appellate record. But even if the Court declines to consider facts that *Respondents* have added to the record, the academic analysis will remain the same: there were genuine issues of material fact to preclude summary judgment.

**A. RAP 9.12 should not be rigidly applied where a party makes assertions contrary to the unchallenged findings of a jury.**

The Rules of Appellate Procedure are “liberally interpreted to promote justice. . . .” RAP 1.2(a). The Court may therefore “waive or alter the provisions of any of these rules to serve the ends of justice[.]” RAP 1.2(c).

Under ordinary circumstances, the effects of RAP 9.12 are well reasoned. Litigants before a trial court are properly dissuaded from waiting for appeal to present their evidence. But here, the circumstances demand flexibility.

The whole purpose of summary judgment is “to avoid a *useless* trial” and the burdens it would impose. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980) (emphasis added). The trial court engages in an intellectual exercise, taking all facts in the light most

favorable to the non-moving party, to determine what a jury *could* reasonably find. CR 56.

Here, a trial occurred anyway because summary dismissal of individual defendants did not eliminate the same questions: whether Jumamil gambled off-the-clock in violation of the Minimum Wage Act and whether her wages were rebated via the poker tables. The Court need no longer guess what a jury *could* find when everyone (including Respondents) knows what the jury *did* find.

The argument is bolstered by Respondents' continued representation of conclusively-refuted opinions as fact. Both Coon and West's briefs are replete with examples. For instance, both argue that no wage rebating occurred because the mandatory six-hour gambling policy was actually voluntary. Coon Br. at 34–36; West Br. at 39–44; *see also id.* at 11 (“Dealers were not required to gamble”). But Respondents' prior opinions are impossible to reconcile with existing fact. *If* Jumamil's gambling was voluntary, then why did a jury expressly find that the casino “require[d] plaintiff to rebate wages[?]” Supp. Ex. 2.

Similarly West states as fact that “Jumamil's wage claim was less than \$280.00 and her rebating claim was for less than \$88.00[.]” West Br. at 16. One wonders how the jury then awarded *more* than these amounts on both counts. Supp. Ex. 2.

What is the purpose of empanelling fact finders, at great public expense, if the judiciary subsequently pretends that their findings never occurred? Jumamil requests that the Court relax the requirements of RAP 9.12 under the narrow circumstances of this case.

**B. Respondents petitioned this Court to make the jury verdict and judgment part of the record on review.**

Certain evidence opposed by Respondents was made part of the record by Respondents. At the same time their briefs were due, Respondents moved to supplement the record. Mot. to Supp. (filed 12/18/12). The documents proposed by Respondents include the jury's Special Verdict Form and the Judgment on the Verdict.<sup>1</sup> On January 9, 2013, Commissioner Schmidt granted Respondents' motion in part, making these documents part of the record on review. Respondents may not, on the one hand, argue that this post-summary-judgment evidence be considered for their purposes only, while simultaneously asking this Court to ignore the same.

Respondents also take issue with the fact that another of Coon's entities owns the property where the casino operated. This fact is in the

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<sup>1</sup> The Designation of Clerk's Papers for these supplemental documents have not been received as of the filing of this brief. Jumamil will describe these portions of the record so that they may be properly identified. Respondent's January 14, 2013 designation refers to Commissioner Schmidt's ruling as Exhibit 1. Jumamil's second complaint is identified as Exhibit 2. The Attachment A to the second complaint is the jury's Special Verdict Form. Attachment B is the Judgment on the Verdict.

record. CP 365 (“land and improvements leased by the Company indirectly from Mr. Coon”). To extent the name of that entity is bothersome, it can be disregarded.<sup>2</sup> But the claim that Mr. Coon—an individual in the pipeline business (CP 94), who was able to infuse \$200,000 into the casino (CP at 364–65) and intended to sell the same for \$5 million (CP 365)—was “well heeled” is supported by the record.<sup>3</sup>

Even if the Court elects not to relax RAP 9.12, the evidence still in dispute has been made part of the record by Respondents themselves.

**C. Genuine issues of material fact precluded summary judgment.**

As we already know that genuine issues of material fact convinced the jury to find for Jumamil, it seems strange to go through the exercise of imagining what the jury *could* have found. Nonetheless, Jumamil will direct the Court to those portions of the record that created the genuine issues of material fact.

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<sup>2</sup> While Jumamil’s post-trial difficulties recovering the judgment owing to her bear on the strong public policies favoring swift recovery of unpaid or rebated wages, Jumamil does not oppose Respondents’ objections to that information. Jumamil also does not oppose disregard of the fact that Susan Mudarri is bankrupt, or that the casino was sanctioned for West’s destruction of records. That West destroyed records is part of the record, however. CP 142, 296–97.

<sup>3</sup> Coon is mistaken in his understanding that Jumamil was asserting that the land where the casino is located is valued at \$5 million. Coon Br. at 15 (citing App. Br. at 17). Jumamil was simply pointing out that Coon valued his stake in the entire casino enterprise at \$5 million. App. Br. at 17. This fact is supported by the record. CP 365.

### III. Argument in Reply

**A. Coon willfully withheld Jumamil's wages because he knowingly and intentionally refused to pay them *after* learning that she worked without compensation.**

Coon's entire argument is premised on what he knew *while* the gambling policy was in effect. He provides a laundry list of things he claims he did not know. Coon Br. 4–5. But Coon *did* know about the policy before he ever became a defendant in this case. Yet he never tendered wages to Jumamil. Even without reaching the question of imputation of liability, Coon's *personal* conduct was willful.

**1. Coon is an “employer” under the wage withholding statute.**

It is not entirely clear whether Coon disputes that he is an “employer” under the wage withholding statute. Jumamil explained that under *Dickens*, an LLC owner is an “employer.” App. Br. at 16–17 (discussing *Dickens v. Alliance Analytical Labs., L.L.C.*, 127 Wn. App. 433, 111 P.3d 889 (2005)) Coon responds that Jumamil's reliance on *Dickens* is “entirely misplaced” because that case declined to address questions of agent culpability.

Regardless of the questions the *Dickens* court declined to answer, it did unequivocally hold that a member of an LLC is “*clearly* an employer” subject to liability under RCW 49.52.070. That fact was critical to the

Courts analysis of the “narrow issue” before it: whether the veil of an LLC that was the member of a delinquent employer could be pierced to impose personal liability for unpaid wages. *Id.* at 443. It certainly was not part of an advisory opinion.<sup>4</sup>

**2. Coon knew that he could tender wages to Jumamil as soon as he learned that she had not been paid for her gambling time.**

As noted by West, Jumamil sent a *pre-suit* demand letter to the casino informing the defendants that Jumamil was seeking unpaid wages. CP 593. Coon claims that this is the first he ever knew of the six-hour gambling requirement or whether dealers “would be paid or not” for their time. CP 94. Upon learning that his casino’s dealers were putting in “almost an extra shift a week,” CP 275, without compensation, Coon tendered no wages to Jumamil (or any other employee), opting instead to evade service of process and subsequently litigate. CP 16–18.

Coon’s reaction to the second Jumamil lawsuit was far different. Almost immediately, Coon and co-defendant Jack Newton tendered wages, interest, and penalties<sup>5</sup> in the hopes of cutting off their liability.

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<sup>4</sup> Jumamil has argued that as an owner, Coon is not entitled to the same considerations of fairness in wage withholding actions as low level “vice-principals” or “agents.” Coon, however, contends that his conduct should be held to the same standard as a low-level employee. Accepting Coon’s position makes no difference with respect to Coon’s personal decision to continue withholding Jumamil’s wages. Whether he did so as an employer, vice principal, or agent is of no consequence.

<sup>5</sup> Jumamil opposed supplementation of the record. Commissioner Schmidt issued an order making the documents pertaining to Newton’s tender of wages part of the

Supp. Ex. 3. Notably, Newton was represented by the same counsel now representing West.<sup>6</sup> West's counsel was the original attorney for Coon when the first lawsuit was filed—at the time Coon decided *not* to tender wages. CP 18.

**3. Coon's decision to continue withholding Jumamil's wages was willful, the result of a knowing and intentional choice.**

As noted by Coon and Jumamil, “[t]he non-payment of wages is willful when it is the result of knowing and intentional action.” *Lilig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986)). Coon goes further, arguing that a controlling owner must *exercise* his authority over the payment of wages. While Jumamil disagrees with the latter contention, the standard is still met here.

While Coon may not have known about the policy before Jumamil demanded her wages, he admits that he knew about it after. CP 94. Despite learning that his dealers had regularly been providing off-the-clock services for the casino, Coon did nothing to remedy the problem such as

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record, presumably because that tender was actually accepted. However, he did not allow Exhibit 2 of Respondents' motion, the documents pertaining to Coon's tender of wages.

In light of Commissioner Schmidt's ruling, Jumamil withdraws her objection to Respondents' joint motion to supplement the record with the documents pertaining to Coon's unaccepted tender of wages. Jumamil asks that those documents be considered.

<sup>6</sup> Coon has been represented Mr. Gallagher. The casino, West, and Newton, have been represented by Mr. McAleenan. But their efforts have always been closely coordinated as evidenced by the many similarities in briefing here and below.

exercising his absolute authority to either write a check for backed payroll or direct someone else to do so. *See* CP 94.

Coon (and West for that matter) cannot feign surprise that the *minimum* wages claimed by Jumamil were minimal. Respondents were in possession of the Dealer Tracking Log which was used to track dealer gambling time to the quarter hour. CP 190–241. They knew that Jumamil earned minimum wage during the months that the gambling policy was in place. *E.g.*, CP 4. Respondents hardly needed discovery to multiply 34 hours by \$8.55.

Coon knew that Jumamil (and many others) had gambled off-the-clock. He knew exactly how many hours she had worked. He knew she earned minimum wage. He knew she had demanded payment of that wage. He has never disputed that he held absolute authority over the casino, including over the payment of wages. He made the knowing and intentional decision, with the aid of counsel, not to pay Jumamil \$290.00.<sup>7</sup> He is liable for the consequences.

**B. Even if Coon had not continued withholding wages, exercise of his absolute authority is unnecessary to impose liability.**

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<sup>7</sup> Certainly, Jumamil had other causes of action, not before this Court, some for which she recovered and some for which she did not. This does not change the fact that Coon would not even concede the wage withholding component of Jumamil's lawsuit. Had he done so, this issue would not be before this Court over two years later, though a few other dealers may have asked for their wages as a result of such a concession.

Because Coon himself willfully withheld wages, the Court need not go any further to impose personal liability upon him. However, liability would attach to Coon even if he had not exercised his absolute authority over the payment of wages.

Both Respondents point out that one of the questions certified by the trial court in *Dickens* was as follows: “Is it enough that the purported agent have some power and authority to make decisions regarding the payment of wages, or must the purported agent actually have exercised such authority?” 127 Wn. App. at 436. As Respondents are quick to point out, the Court declined to answer that question. *Id.* at 442.

Jumamil puts a similar question before the Court: Is it enough that a *manager*—a controlling owner at that—possess absolute power and authority to make decisions regarding the payment of wages? Jumamil contends that it is.

**1. Coon is not entitled to the deference afforded to low-level agents—employers are liable based on their authority.**

In analyzing what level of control is required of Coon as an employer, Coon maintains that he should be held to the same standard as an employee earning \$16.50 per hour. *See Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 517, 22 P.3d 795 (2001). Just as the bookkeeper in *Ellerman* was not individually liable because she did not sign checks, *id.*

at 523, Coon argues he cannot be liable because he did not sign checks either. But as already explained, the considerations for fairness that compelled the result in *Ellerman* do not extend to an employer with absolute authority over wages.

The *Ellerman* Court's analysis centered on the "substantial unfairness" stemming from "imposing personal liability on managers or supervisors *who had no direct control over the payment of wages.*" *Id.* at 522 (emphasis added). But the Court distinguished its analysis from that of an employer. It explained that a low-level supervisor should not "have personal liability if **the company** did not pay the employee, regardless of whether the . . . supervisor had any control over how and when **the company** paid its employees." *Id.* at 521.

The Supreme Court has refused to apply *Ellerman's* deferential standard to owners with authority over the payment of wages. In *Morgan v. Kingen*, the corporate owners relied on *Ellerman* to argue that they could not be personally liable for unpaid wages because they lacked control over wages once the company went into bankruptcy. 166 Wn.2d 526, 535, 210 P.3d 995. The Court responded that "*Ellerman* is inapposite." *Id.* The owners were held personally liable because "both had *authority* over the payment of wages. *Id.* at 536 (emphasis added).

Coon offers nothing to explain why the fairness considerations in *Ellerman* apply to him or why his undisputed *authority* over wages does not make him responsible when wages go unpaid. It is enough that Coon possesses authority over the payment of wages, regardless of how he exercised or failed to exercise that authority.

**2. Willfulness is established by Coon’s decision not to exercise his managerial authorities.**

Even if Coon never had knowledge of the gambling requirement, before or after suit was filed, the public policies set forth in Jumamil’s opening brief would counsel in favor of imputing the willful acts of the delegates of his authority to him. *Pope v. University of Washington*, 121 Wn.2d 479, 859 P.2d 1055 (1994) is not to the contrary.

*Pope* concerns the University’s institutional determination regarding the withholding of social security taxes. *Id.* at 481 *et seq.* The Court explained that “[a] finding of intentional nonpayment by a party *who is not an individual* requires the organization to reach a consensus regarding the action taken.” *Id.* at 491 (emphasis added). It was in this context that the Court issued the dicta<sup>8</sup> now relied upon by Respondents.

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<sup>8</sup> One paragraph earlier, the Court held that the University’s deduction “does not deprive the employee of wages under RCW 49.52.050.” *Pope*, 121 Wn.2d at 490. It was thus unnecessary for the Court to decide whether those wages had been willfully withheld. *See Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960) (dicta is language not necessary to the decision in a particular case).

The University of Washington is distinct from Lakeside Casino, LLC. It is not controlled by a single individual with absolute authority over all matters. *See id.* at 491 (no evidence of consensus on withholding issue) Coon was required to reach a consensus with no one. *Pope* is inapposite.

Alternatively, Jumamil has argued that even in the absence of Coon's continued withholding of Jumamil's wages, the nonpayment was in fact willful on the part of Coon—"the *result* of knowing and intentional action." *Lilig*, 105 Wn.2d at 659 (emphasis added). Coon knowingly and intentionally abdicated his authority over wages *resulting* in the initial withholding of Jumamil's wages.

Deciding not to act is a decision in itself—an exercise of one's authority *not* to act. "An act of refusal is a willful business decision" that can "cause[] the wages owed to remain unpaid." *Morgan*, 166 Wn.2d at 537. Lakeside Casino, LLC vested Coon with the power to act as its manager. In that role (as opposed to owner), Coon decided to do nothing. He hired unscrupulous managers. He chose not supervise them. As a result, wages were unlawfully withheld.

Coon points to the limited liability company statute for the proposition that the acts of his employees cannot be imputed to him as a *member* of an LLC. *See* RCW 25.15.125. First, the LLC statute provides only qualified immunity ("Except as otherwise provided . . ."). It further provides that

members may be personally liable “to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances.” RCW 25.15.060; *see also Morgan*, 166 Wn.2d at 538 (finding corporate shareholders liable for wage rebating). Second, Coon’s liability is premised more on his role as the sole *manager* of Lakeside. The LLC statute does not speak to a manager’s liability when he delegates his managerial authority.

In addition, Coon equates his complete failure to act as the casino’s manager to mere carelessness. But “[t]he concept of carelessness or inadvertence suggests errors in bookkeeping or other conduct of an accidental character.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998). Coon’s deliberate decision to ignore his managerial duties is hardly a typographical error in a payroll spreadsheet.

Ultimately, neither the law nor public policy favor Coon’s willful blindness defense. Even if he had never exercised his authority over wages before or after suit was commenced, he should still be personally liable. That is, even if his only exercise of authority was the disregard of that authority, it was still willful and it still caused harm.

**C. West “collected” and Coon “received” rebated wages.**

Neither Coon nor West even attempt to address the meaning or scope of the prohibition against “collect[ing] or receiv[ing]” rebated wages.

RCW 49.52.050(1). Jumamil’s opening brief explains that “collect” is not read so narrowly as to reach only those circumstances where an employee literally hands money to a supervisor. App. Br. at 28–29. Nor is “receive” limited to physically taking cash in one’s hands. App. Br. at 36. Respondents offer no competing interpretation.

**1. Jumamil’s gambling losses were ceded in favor of Coon—he therefore “received” them.**

As discussed in Jumamil’s opening brief, and undisputed by Coon, the wage-rebating prohibition was intended to apply “to a situation where the employee gives up or cedes a portion of [her] . . . wage to or *in favor of* . . . the employer . . . .” *Carter*, 18 Wn.2d at 593 (quoting *United States v. Laudani*, 134 F.2d 847, 849 (3rd Cir. 1943)) (emphasis added).

Coon never addresses the suggestion that Jumamil’s gambling losses were ceded “in favor of” him. Instead, Respondents argue that Jumamil’s wages were not rebated because “only a very small percentage of her gambling losses would have gone to Freddie’s.” Coon Br. at 27; West Br. at 34. From this, we are to conclude that the casino—and in turn its owner—received no real benefit from requiring its dealers to gamble.

First, the wage rebating statute does not say that an employer can rebate a tiny bit of wages from his employees. The employer cannot rebate “any part of wages.” RCW 49.52.050(1).

Second, it strains reason to suggest that Jumamil’s gambling losses—*all* of her gambling losses—were ceded to the benefit of anyone other than her employer. The casino forced dealers to gamble back their wages to increase its bottom line. Indeed, West’s “Dealer Support” memo begins by attributing the “the spike in recent business” to gambling by the dealers. CP 243. Respondents now contend that if they are responsible for anything, it would only be the small fraction of the rake that directly went into the chip tray at the individual table where Jumamil was losing her wages. This offends the fundamental policies underlying the wage statutes—that employees retain the entirety of the wages they earn. *E.g.*, *Schilling*, 136 Wn.2d at 157.

That Coon does not recall meeting Jumamil and claims to have drawn no money from the casino is of no consequence as willfulness is not an element of a wage *rebating* claim. RCW 49.52.050(1); *compare* RCW 49.52.050(2) (willfulness an element of wage *withholding*). Coon derived a benefit because his company unlawfully required Jumamil to gamble. He must pay her back for the same, regardless of what he claims he knew.

In terms of summary judgment, there were genuine issues of material fact from which a jury could have reasonably concluded that Jumamil gambled away her wages “in favor of” Coon. The losses certainly were not to her benefit. CP 263. The casino saw increased revenue. CP 243.

Coon was the majority owner of the casino and stood to benefit immensely from unlawfully inflated balance sheets. *See* CP 364–65.

**2. West does not dispute that the gambling policy he designed and implemented amounted to a collection of wages.**

West does not dispute that designing and enforcing a policy by which employees inevitably cede wages to their employer amounts to “collecting” wages under the wage rebating statute.<sup>9</sup> He does not do so despite the fact that Jumamil’s opening brief details the variety of reasons why the wage rebating statute’s use of the word “collect” is not limited wages being taken from a paycheck or physically handed to a supervisor. App. Br. at 28–29.

Rather, West sidesteps the issue by arguing only that he did not *receive* those wages. West Br. at 33.<sup>10</sup> This is a straw man<sup>11</sup> as Jumamil

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<sup>9</sup> Respondents both cite *McDonald v. Wockner*, 44 Wn.2d 261, 267 P.2d 97 (1954), a case where rebating was found, because it is “quite dissimilar” to the instant case. While the employee there literally handed earnings back to his employer, nothing in *McDonald* indicates that this is the *only* way wage rebating may occur. Indeed, Respondents do not argue that it is.

<sup>10</sup> West thrice asserts in his brief, with no analysis or citation, that he did not collect Jumamil’s wages. West Br. at 5, 35, and 36.

<sup>11</sup> West also contends in a footnote that he cannot be personally liable to Jumamil until he has been convicted of a misdemeanor. West Br. at 27 n.19. There is no such requirement. The plain language of RCW 49.52.070 only requires an individual to “violate any of the provisions of RCW 49.52.050.” (Emphasis added.) It does not require criminal conviction. Making the return of a worker’s wages contingent upon the ability of a local prosecutors office to pursue a misdemeanor charge would hardly “advance the legislature’s intent to protect employee wages and assure payment.” *Morgan v. Kingen*, 141 Wn. App. 143, 169 P.3d 487 (2007) *aff’d*, 166 Wn.2d 526, 210 P.3d 995 (2009). Unsurprisingly, numerous cases have imposed civil liability under RCW 49.52.070 without requiring, or so much as mentioning a criminal conviction. *See, e.g., id.*

has only contended that West is liable because he *collected* them. Indeed, Jumamil has been quite clear on this point. *See* App. Br. at 26 (“the wage-rebating provision . . . prohibits two distinct acts”); 33 (“West conflated the distinction below—treating the actions as one and the same”).

West further avoids the issue by rehashing the inapplicable *Ellerman* standard to contend that he is not an “agent.” But West makes no effort to explain why the analysis in *Ellerman*, a case concerning agent authority over wage *withholding*, should extend to the wage *rebating* provision. As discussed by Jumamil, and ignored in West’s response, the key to the Court’s analysis in *Ellerman* was that the wage *withholding* provision “requires the vice principal to withhold wages ‘[w]illfully and with intent to deprive the employee’ of her wages.” 143 Wn.2d at 521 (quoting RCW 49.52.050(2)). The wage *rebating* provision contains no similar requirement of willfulness, thus rendering *Ellerman* inapplicable.

Still, West argues under the inapplicable *Ellerman* standard that it is “undisputed” that he just one of four low-level managers with little authority. To the contrary, West’s claims of insignificance have always been hotly contested. At oral argument on West’s summary judgment motion, Jumamil’s counsel argued: “Mr. West absolutely did [have control over day-to-day operations] and the record is replete with his involvement in this policy.” RP (Vol. II) at 15.

West was the casino's 30(b)(6) designee. CP 57, 537. He testified that he set up the mandatory gambling policy. CP 539–42. West announced the policy to the dealers. CP 541. West drafted the June 6, 2010 memo detailing his policy. CP 243, 542. West's signatures appear throughout the "Dealer Tracking Log." CP 190–241. West told Jumamil that she would not have a job if she did not gamble. CP 263. West made the "recommendation" to terminate Jumamil after she stopped gambling. CP 78. West completed Jumamil's termination paperwork, ostensibly dated August 17, 2010, the very same day Jumamil was terminated. CP 77. No one is talking about imposing "strict liability"<sup>12</sup> on West. He is liable because the evidence overwhelmingly demonstrates that he unlawfully collected wages.

In contrast, there is virtually no evidence that any other manager participated in the implementation and enforcement of the gambling requirement anywhere near the same extent as West. He testified that he "believed [he] worked - - a little bit with Ben [Hoang] or Toan" in enacting the policy. CP 540. West recalled that Hoang and Newton were generally favorable but said nothing more of their involvement. *Id.* West

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<sup>12</sup> West also cites *Pope v. University of Washington*, twice, for the proposition that he cannot be found liable without fault. He provides no further analysis. But *Pope* is a wage *withholding* case under which the statute expressly requires a finding of willfulness. There is no wage *rebating* claim asserted in *Pope* and so the passage is inapposite to the sole wage *rebating* claim against West. Regardless, there is ample evidence that West acted with intent to collect wages.

only involved Tim Hobson “to make sure [West] wasn’t violating a Labor & Industries laws.” *Id.* Roger Hobson’s only apparent role was that West asked him to be present while West fired Jumamil. CP 55–56.

West never disputes that his policy, under which dealers would *inevitably* lose money, constitutes “collection” of wages. There is ample evidence from which a fact finder could conclude that he designed, implemented, and the scheme. Even under the inapplicable *Ellerman* standard, summary judgment was inappropriate.

**D. Commissioner Schmidt has ruled that the appeal is not moot.**

Commissioner Schmidt allowed Respondents to supplement the record with documents evidencing the tender and receipt of \$2,794.48. Though he found that this evidence “may change the result of the appeal, the Commissioner expressly found that “Respondents do not establish that those exhibits moot this appeal because the Appellant may still receive effective relief.” Supp. Ex. 1. As mootness has already been decided, Jumamil will rest on her briefing in response to the motion to supplement.

Jumamil understands the Commissioner’s ruling as impacting the appeal in only a limited way: since Jumamil has recovered \$2,794.48, she could not recover that amount again on remand. Jumamil does not disagree and has no intention of seeking a double recovery.

Respondents' suggestion that the recovery of less than \$2,800 renders the entirety of this action moot is unfounded. Having forced Jumamil to litigate the recovery of her withheld and rebated wages for two years, the tender of \$2,794.48 is too little, too late. "Where liability is found, the civil remedy is personal liability for exemplary damages *and* attorney fees." *Morgan*, 166 Wn.2d at 538 (emphasis added). The remedial purposes of the anti-kickback statute would hardly be served if an employer could evade liability for the costs of suit based on a payment made long after the fact. This is presumably the "effective relief" that Commissioner Schmidt understood was still available.

**E. Dealers did not gamble their wages back voluntarily.**

Respondents reassert two arguments that were unsuccessful below, both of which rely on the rebuttable premise that gambling was voluntary under the six-hour policy. *See* RP Vol. II at 19 (trial court "already . . . ruled that there are material issues of fact"). The record is replete with evidence that the policy was *not* voluntary.

First, Respondents rely on *State v. Carter*, 18 Wn.2d 590, 142 P.2d 403 (1943) to argue that Jumamil's claims fail because she voluntarily gambled. Coon Br. at 34; West Br. at 39 ("If the contribution is *voluntary*, it does not necessarily constitute a rebate"). Indeed, the Court stated: "*if*

an employee exercises his *free choice* . . . his act does not amount to a rebate.” *Id.* at 34 (emphasis added).

West alone also points to a safe harbor in RCW 49.52.070 where employees “knowingly submit[]” to the rebating of their wages. Of course, knowingly submitting necessarily requires a voluntary and intentional deferral on the part of the employee. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 836–37, 214 P.3d 189 (2009).

Here, there is substantial evidence that the six-hour gambling policy was not voluntary. Perhaps most compelling is the second declaration of Daniel Carruthers, which corrected the “misleading” first declaration that West coerced<sup>13</sup> him to sign. CP 181–85. Carruthers declared:

In reality, that “choice” was forced upon dealers who needed to make a difficult financial calculation: will we make more money in the extra hours that we keep than we will lose gambling for six hours?

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<sup>13</sup> Courts can and should deny summary judgment where the credibility of the movant’s witnesses is in serious question. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

When, at the hearing on a motion for summary judgment, there is contradictory evidence, *or the movant’s evidence is impeached*, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. *The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.*

*Id.* (emphasis added). Subsequent decisions have refined the rule set forth in *Balise*, noting that the movant’s witnesses must be impeached on a material issue. *E.g., Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991).

Here, the fact that West coerced the declaration of not only Carruthers, but potentially nine other dealers, casts significant doubt on his credibility. These issues were raised with the trial court. CP 504–05. The trial court erred in granting summary judgment to West based on *West’s* disputed claims that he was a low-level manager.

I would not characterize my decision to gamble during that time as a “choice” of my own free will. . . . Gambling at Freddie’s under the dealer support policy felt like a job.

CP 183 (Decl. at ¶¶ 7–8). Carruthers’ fiancé, echoed this sentiment:

This was a false choice. While dealers may have been able to choose not to gamble, they would at the same time be choosing to give up income. Daniel would not have gambled nearly as much as he did, if at all, had it not been for Freddie’s dealer support policy.

CP 179 (Decl. at ¶ 6). Other dealers offered similar testimony about the burdens of the “choice” to gamble. CP 274–75; 328–29. Perhaps most notably, West told Jumamil that she was “not going to have a job” if she refused to gamble. CP 263.

West’s memo on the policy speaks in terms of things dealers could do to “protect [themselves]” from the consequences of not hitting their six hours. CP 243. It also cautions dealers against “abus[ing] the system.” *Id.*

A reasonable juror could conclude from any of this evidence that dealer support was not a voluntary. Summary judgment would be inappropriate on either basis.

#### **IV. Conclusion**

Respondents bear significant responsibility for Jumamil’s wages. They necessitated the costly litigation that followed. Their dismissal was error.

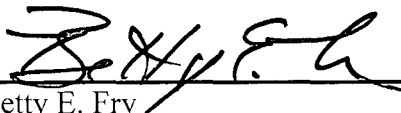
**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 22nd day of January 2013, I  
did serve via email and by ABC Legal Messenger, a true and correct copy  
of the foregoing by addressing and directing for delivery to the following:

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